

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 In Re: METHYL TERTIARY BUTYL
4 ETHER ("MTBE") PRODUCTS
5 LIABILITY LITIGATION

00 MDL 1358 (SAS)
00 CV 1898 (SAS)

Telephone Conference

New York, N.Y.
October 22, 2013
2:30 p.m.

8 Before:

9 HON. SHIRA A. SCHEINDLIN

District Judge

12 APPEARANCES

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1 (Case called)

2 THE COURT: Good afternoon. Let me state that I now
3 have three letters. The plaintiff submitted a six-page single-
4 spaced letter on October 18th with 285 pages of exhibits the
5 defendant submitted a letter on October 18th, a 10-page single
6 spaced letter with 17 pages of exhibits.

7 Today the plaintiff submitted I guess a reply letter
8 dated October 22nd with some 40 pages of exhibits. It is not
9 realistic to think anybody can read a letter that walks in the
10 door the same day as the conference. The reply letter is seven
11 pages single-spaced, as I said, with 40 and more pages of
12 attachments. There is far too much material here. It is not
13 appropriate for a telephone conference. It also is a sign that
14 the discovery is out of hand in this case, disorganized, and
15 there's got to be a motive behind it.

16 This is the oldest case around. I know this case is
17 about seven years old, six or seven years old. From reading
18 these letters you would think this was six months into the case
19 instead of six years into the case.

20 There is something wrong going on here in terms of the
21 scope of this deposition discovery. We have had years of
22 document discovery. We have had months of deposition
23 discovery. On the eve of the close of discovery people are
24 serving virtually tens if not hundreds of notices on each other
25 for depositions where the Federal Rules of Civil Procedure say

1 ten depositions presumptively per side unless the Court orders
2 more. I don't ever remember approving numbers like I'm seeing
3 in these letters. So there are really a lot of problems.

4 All that introductory being said, I gather from at
5 least the plaintiffs' letter that a lot of these issues are
6 already before the special master, and there is really no point
7 in two of us dealing with the same problems. It is just a
8 waste of resources.

9 If the special master has been supervising the
10 discovery in the Puerto Rico matter, I don't know why you came
11 here instead of going directly to the special master. To kick
12 the ball back and forth between the district court and the
13 special master and the district court and the special master is
14 just another long delay.

15 Now that you have been written all these letters here,
16 put them on my plate, I don't know whether it makes sense to
17 say now we are going to have another delay where I send all the
18 same letters to the special master and the special master sits
19 down with everybody and resolves every one of these endless
20 disputes, some of which are bigger and some of which are
21 smaller.

22 As to this last extension of discovery, I believe I
23 said that's it, no more, discovery is over. And there is no
24 way, again, that you are going to complete all this by that
25 date. I think the date is sometime in December. December 6th

1 is the date my clerk says. That's five or six weeks away, and
2 you have tons of disputes and tons of notices out.

3 clearly, the parties here want to be in permanent
4 discovery, never want to finish, never want to call an end to
5 this and bring the case to resolution one way or the other.
6 They just want to go on with endless discovery. It can't be.
7 And that is the beginning.

8 I'm willing to hear the parties discuss whether it
9 should be in the district court or before the special master.
10 Then I will try to turn to some of the specifics that I have in
11 the letters before me. I have read through most of the
12 material, not all of today's material. Does anybody want to be
13 heard on this issue of why it is here, not there, or why it
14 should be here, not there, and what is the fastest way?

15 MR. RICCARDULLI: Stephen Riccardulli, counsel for
16 Esso and ExxonMobil and also defendants' liaison counsel. The
17 issue that we brought to you before the last status conference
18 was the issue of the 121 notices that plaintiff served on the
19 last day of the discovery schedule.

20 THE COURT: Correct.

21 MR. RICCARDULLI: We brought that issue to you in the
22 first instance, which I think led to this conference call being
23 scheduled.

24 THE COURT: Right. But these letters are way beyond
25 that single issue identifying which of the 120 or 121 the

1 plaintiffs really wanted to push and which are really just
2 placeholders. That dispute is in these letters, but that is
3 only one of 25 disputes.

4 MR. RICCARDULLI: Yes, your Honor. I am not aware of
5 the other issues that are raised in these letters other than
6 perhaps one discovery motion that related I think to the Shell
7 defendants being brought to the special master. I'm not aware
8 of any of these other issues that are contained in these
9 letters being already brought before the special master.

10 THE COURT: That said, should this all go before the
11 special master? Is he more available to meet with you very
12 promptly later this week or first thing next week and just if
13 it takes four hours, work through every bit of it and solve it?
14 Where should these disputes be?

15 MR. RICCARDULLI: Your Honor, from my perspective, we
16 are willing to go to the special master, and I'm happy to check
17 with him. I could send him a note now seeing what his
18 availability is, if the Court wants to refer this to him for
19 resolution.

20 MS. O'REILLY: This is Ms. O'Reilly, if I may address
21 the question.

22 THE COURT: Go ahead.

23 MS. O'REILLY: You put your finger on one of the key
24 issues that we raised in our reply brief, and that is that the
25 submission to you invited you to delve into the depths of

1 discovery, which is really not an appropriate use, in our
2 opinion, of the Court's time.

3 If the plaintiffs feels that defendants' objections or
4 unwillingness to produce a witness on certain designated issues
5 impedes discovery, then we can take these issues to the Special
6 Master Warner. We are still working through deposition
7 notices, taking witnesses. We may be able to resolve these
8 questions through witnesses that are being deposed without
9 quarreling, designating those issues. I believe some of the
10 defendants will resolve it to our satisfaction.

11 But they want a ruling on objections they have made
12 even though we haven't sought to compel a witness on those
13 issues. I think it is not a correct use of the parties and the
14 court's time, going forward with part of the scheduling of
15 depositions and weaning out those that don't need to be taken
16 and that can be done by the parties until we reach an absolute
17 impasse.

18 THE COURT: That is not the only kind of issues that
19 are raised here. There are some broader issues. Maybe I can
20 give guidance on the broader issues and then refer what is left
21 to the special master when it is very detailed. But I don't
22 want to see slippage. There are really only five weeks left,
23 and there is an extraordinary amount of disputes in these
24 letters.

25 I agree with you that some of these disputes will go

1 away on their own and are going away, as you work with
2 individual defendants. But some of the issues are broader and
3 I probably should take it up.

4 With that introduction, I will spend maybe a half
5 hour, and then what is left I will refer to him and ask that he
6 be available promptly. I know he has been on a long trial, but
7 I think it is over.

8 I will start with the plaintiff's letter solely
9 because it came in first. The first objection is to deposing
10 attorneys who have been active participants in the litigation
11 team for the plaintiffs. I would like one defense counsel to
12 tell me why you need to depose attorneys.

13 It is disfavored. It is unusual. It ends up with
14 nothing but objections of privilege and work product,
15 deliberative process and everything else. Instinctively,
16 plaintiffs are right, you shouldn't do this unless you can show
17 some absolutely unique necessity that these are the only people
18 with knowledge on some specific issue that doesn't relate to
19 their role as an attorney. What might that be? Which one
20 defense counsel is going to quickly address that?

21 MR. RICCARDULLI: Your Honor, I can address this
22 issue. We have noticed the deposition of three lawyers. I
23 have conferred with the defendants this morning, and we are
24 willing to withdraw the notice as to one of the three, and that
25 is Ms. Blanche Gonzalez. I can direct the other two lawyers

1 that we noticed. The lawyer is Wandynier Burgos Vargas.

2 For the individual who verified plaintiffs' responses
3 to interrogatories regarding natural resource damages, we have
4 met and conferred and requested from plaintiffs after we
5 noticed this individual's deposition and requested that they
6 replace that verification with a nonlawyer employee for the
7 commonwealth, and that we would be willing to accept that
8 certification or verification so we could depose that
9 individual. Plaintiffs have refused that offer.

10 We have since served a 30(b)(6) notice on natural
11 resource damages, and the letters you received on the 18th
12 plaintiffs are objecting to that notice in total as well. So,
13 at this time we can't depose the individuals who verified the
14 interrogatory responses on behalf of the commonwealth, and they
15 are objecting to producing a 30(b)(6) corporate witness on the
16 topic of natural resource damages.

17 If plaintiffs would put up a nonattorney and replace
18 that verification, we could avoid having to depose the lawyer
19 in that instance.

20 THE COURT: Right. But then the person who is the
21 substitute for verification would be subject to the 30(b)(6)
22 notice to which they are objecting anyway. We have to turn to
23 that. It is really not a matter of who verifies but what you
24 want to ask this damages expert. I'll put that off until I get
25 to that part of the letter.

1 What about DeJesus, the other attorney?

2 MR. RICCARDULLI: Mr. Flores DeJesus was quoted last
3 month in a number of newspapers in Puerto Rico giving the
4 following quote. "People should not be alarmed given that the
5 water that they consume is free from the presence of this
6 additive MTBE and is fit for human consumption. The locations
7 subject to the lawsuit have not been nor will be in contact
8 with the bodies of water used for supplying local water
9 consumption."

10 These statements are directly contrary to the
11 allegations and other positions that either fact witnesses or,
12 frankly, the obligations that the plaintiffs have taken in this
13 litigation. We want to depose Mr. Flores DeJesus about the
14 basis for his statement.

15 THE COURT: Very simply, denied. You may not take
16 that deposition. Should that person be listed as a trial
17 witness to say what he happened to say to the press, I'll worry
18 about it then. You can depose him before he ever says it under
19 oath at trial. I don't really care what he says to the press.
20 It is not evidence. It is not the position in the complaint,
21 as you said.

22 We can't waste time. I'm done with the attorneys. I
23 will turn to the one middle one, the verification issue, when I
24 get to damages.

25 Now let's talk about the Department of Health

1 employees. The plaintiffs write that seven of them have no
2 personal knowledge regarding the trial sites and they are all
3 offering declarations that would say I have no personal
4 knowledge of any of the trial sites.

5 There is no objection as to Mr. Torres, so you can
6 have Torres. In fact, according to the letter, he is scheduled
7 for tomorrow. And they can't find two of the people you want,
8 Morales and Rivera. They have tried.

9 What is left to talk about in this paragraph of the
10 plaintiffs' letter? If the plaintiffs' lawyers tell me that
11 seven people are willing to give you declarations that they
12 have no personal knowledge of MTBE at the trial sites, that's
13 it. We cannot waste time having seven useless depositions.

14 MS. GERSON: Your Honor, Lisa Gerson for ExxonMobil
15 and Esso. I can speak on this topic. We will go to the seven,
16 leaving out Mr. Torres and the two that are former employees.
17 Of the seven, two, Mr. Hernandez and Ms. Mendoza, were
18 identified in another deposition as having responsibility on
19 several topics that are not necessarily only on MTBE, as
20 dealing with the drinking water revolving fund, that is Mr.
21 Hernandez, and Ms. Mendoza as having knowledge of being the
22 person in charge of private wells and nonprofit water systems.

23 Our position is that plaintiffs have waived their
24 objections to those two. In an email for plaintiffs' counsel,
25 we were given a proposed declaration. But then we were told

1 that if defendants continue to maintain that the depositions of
2 these two individuals are necessary, they are available on the
3 following dates. That is actually next week. We confirmed
4 that we will be taking them next week. So we were surprised to
5 see those being objected to at this point.

6 THE COURT: And the remaining five?

7 MS. GERSON: The remaining five are each of the
8 regional coordinators for an area where there is a trial phase.

9 THE COURT: They are going to give you a declaration
10 saying they have no knowledge regarding MTBE or the trial
11 sites. That is their testimony. To cut to the chase, you can
12 have the two, you can't have the five. You can have the one
13 tomorrow, and the two missing are missing. I'm going right on
14 to the air quality issue.

15 I read the plaintiffs letter. I don't know that I
16 really have a response to it, so to speak, because you had so
17 many issues to raise in the defense letter. But judging solely
18 from the plaintiffs' letter this issue about lead is just not
19 an issue in this case. Why are the defendants wasting time on
20 an issue that is not an issue in this case?

21 MR. STACK: Your Honor, William Stack for ExxonMobil.
22 There are two aspects of this. First and foremost, Puerto Rico
23 is not an RFGC.

24 THE COURT: Correct.

25 MR. STACK: We know that they are supplied with

1 conventional gasoline. As your Honor knows from prior cases
2 that you have been involved in, and discovery, conventional
3 gasoline did have some MTBE in it to replace lead and to
4 maintain octane levels. We are seeking basic information
5 concerning knowledge of the commonwealth concerning air quality
6 effects on reducing lead in gasoline.

7 THE COURT: Why do you need that? This letter
8 convinces me that it is not an issue in this case.

9 MR. STACK: It is an issue in this respect, your
10 Honor, in that we are at some point going to have to address
11 what benefits they have accrued from the use of MTBE in
12 gasoline, whose only use was to maintain octane and which has
13 been regulated. We have spent some time here today that there
14 are limitations on the percentage of MTBE that can be in
15 gasoline in Puerto Rico because there are limits for vapor
16 controls and gasoline journals and gasoline shipping
17 operations. So it is germane because they were controlling
18 vapor emissions from these large terminals and from these truck
19 loading facilities.

20 THE COURT: That's fine. That's got nothing to do
21 with what this paragraph seems to be about. They think you're
22 trying to show that MTBE was a better, safer octane enhancer
23 than leaded gasoline. But then they go on to say it wasn't
24 available anyway, lead wasn't available as an octane enhancer
25 during the trial period so lead was not a legally available

1 substitute. Maybe that is not your point. They think that is
2 your point, that you want to show that there was a choice here.
3 But they are saying there was no such thing, there was no
4 possibility of lead being a legally available substitute at the
5 relevant time period.

6 MR. STACK: That is correct.

7 THE COURT: Then I really don't understand the
8 argument of why this is relevant. To cut to the chase, no.

9 Let's move on to 30(b)(6) regarding natural resources.
10 The plaintiffs' letter says this is just plain overbroad. You
11 are seeking information regarding all natural resources in the
12 commonwealth. You are not even limiting it to trial size, not
13 limiting to it fresh water, which are the only natural
14 resources involved here. This seems to be an overbreadth
15 question.

16 Then they say that they already produced the sole
17 estimate of groundwater natural resources damages that was
18 previously prepared.

19 MR. STACK: We have had discussions with plaintiffs'
20 counsel. We have learned from them that they are apparently
21 limiting their claims in this case to groundwater, perhaps some
22 surface water. As a consequence, we were willing to talk to
23 them about the establishment of base lines as well as the
24 extent of natural resource damages in and around the trial
25 site.

1 THE COURT: So you think you can narrow the request
2 here and it won't be overbroad?

3 MR. STACK: That is correct, your Honor.

4 THE COURT: Then I am going to move on. Now we are up
5 to the damages, which I think was taking us back to that
6 attorney verification idea. There the plaintiffs say that the
7 defendants are seeking commonwealthwide damages and not
8 limiting to the trial sites. They write that if it is allowed
9 at all, it should be limited to the trial sites at this time.
10 And they say that plaintiffs have identified in written
11 responses the so-called historic out-of-pocket costs and that
12 any other damages will be explained by expert reports and
13 testimony and we should put this off till we get to that.

14 Again, the way the notice is phrased, it is so broad.
15 It seeks all information regarding plaintiff's implementation
16 of about six different acts: The initiation of the litigation,
17 the establishment of water clean-up, the development of EQB --
18 what is that, quality control guidance? -- the ban on MTBE, and
19 underground storage tanks. It is just not one subject. It
20 really is too broad.

21 It strikes me that the plaintiffs have a good point
22 that if they have already explained to you the historic
23 out-of-pocket costs at the trial sites, the damages analysis is
24 always for an expert.

25 MR. STACK: We have had discussions with the

1 plaintiffs concerning this. We have offered to narrow this to
2 the trial sites and to address the issues where we believe
3 there are still open questions regarding historic past costs
4 for assessment, mitigation, and/or alternative water in
5 relation to the trial sites and the areas around the trial
6 sites where they have identified threatened wells.

7 THE COURT: You have addressed all the arguments
8 except for their point about expert testimony. Why doesn't the
9 bulk of this wait for a report from a damages expert?

10 MR. STACK: Your Honor, I think in terms of the
11 factual information, we are entitled to obtain information from
12 a representative of the commonwealth to verify our
13 understanding both for purposes of our expert analysis and also
14 for purposes of examining the basis of their expert opinion.

15 THE COURT: The expert opinion isn't prepared yet.
16 You are sort of jumping the gun. As far as getting to the
17 underlying facts, all they can give you now, they say, is out-
18 of-pocket costs at the trial sites, and they have. I don't
19 know what more you think you can get before their expert has
20 given the report.

21 Aren't the reports staggered? Won't you have the
22 plaintiffs' damages expert before your expert report is due?

23 MR. STACK: The answer is I believe it is established
24 that way, yes, your Honor.

25 THE COURT: You will see then what the expert relied

1 on, what underlying facts he or she used to prepare the report.

2 I don't know what more they can give you now.

3 MR. RICCARDULLI: If I may, I wanted to add one point
4 that Mr. Stack may not be aware of. It is the issue that
5 resulted from a deposition that I was in this afternoon and
6 where we did question a fact witness about certain past damages
7 and cost issues. Plaintiffs kept lodging the objection that
8 this was not a 30(b)(6) witness or corporate representative so
9 that her answers couldn't bind the commonwealth.

10 THE COURT: Mr. Riccardulli and Ms. O'Reilly for the
11 plaintiffs, you can't have it both ways. Either you are going
12 to put a 30(b)(6) witness up who will explain whatever proof we
13 now have on damages or you are going to have to let these
14 people give the information and not object. To the extent that
15 there is proof of damages incurred now in or around the trial
16 sites, it is not a proper objections to this isn't a 30(b)(6)
17 witness and can't bind the commonwealth. That is fine if
18 you're going to give them a 30(b)(6) witness fast, but you
19 can't have it both ways.

20 Which of you is taking responsibility for either
21 dropping that objection or immediately producing a 30(b)(6)
22 witness who can talk about the damages incurred to date? I
23 want to hear from some plaintiff's counsel.

24 MR. SHORT: We would be fine if the notice was limited
25 to the trial sites and those historic costs. We would produce

1 a 30(b)(6) witness.

2 MR. RICCARDULLI: Very good, your Honor.

3 THE COURT: Done. Get that date and get it done.

4 Now we are up to the Department of Transportation. In
5 their objections they say you seek commonwealthwide information
6 rather than trial sites. They point out that the Department of
7 Transportation is a consumer of petroleum products and there is
8 nothing they are going to add. What do you want from the
9 Department of Transportation and public works?

10 MS. GERSON: Your Honor, Lisa Gerson for Exxon and
11 Esso. We certainly are not seeking site-specific or every site
12 in the commonwealth information through this notice. Really it
13 is not a site-specific notice we are after. Plaintiffs state
14 that the Department of Transportation is simply a consumer of
15 petroleum product. What they don't say is they are also a UST
16 owner and operator. What we are trying to get with the issues
17 here is their knowledge of MTBE warnings on maintenance of
18 USTs.

19 THE COURT: Maintenance of their USTs, if any, at
20 trial sites, that's what you can get, not commonwealthwide now.

21 MS. GERSON: Your Honor, we were looking at this one
22 for policies, commonwealth policies, as supposed to specific
23 USTs.

24 THE COURT: The Department of Transportation, which is
25 a customer of the petroleum products, why should they have the

1 policies?

2 MS. GERSON: Your Honor, as you know, there is a
3 failure to warn claim.

4 THE COURT: Yes.

5 MS. GERSON: What we are after is what did the DOT
6 know, what were they told by the Commonwealth of Puerto Rico,
7 by the environmental quality board, about how to handle
8 gasoline, how to store MTBE.

9 THE COURT: As a consumer, as a user, what warnings
10 did they receive?

11 MS. GERSON: Right.

12 THE COURT: Stop. That seems reasonable. Plaintiffs'
13 counsel, produce somebody from the DOT who can say nothing more
14 than that, what warnings did they receive, what directives were
15 they given as a consumer.

16 MR. SHORT: Your Honor, our putting up a witness for
17 early knowledge on behalf of the commonwealth --

18 THE COURT: I just ruled in favor of the defense on
19 this. Find somebody from DOT who can say what they were told
20 in terms of warnings or regulations or directives on how to
21 handle. They did have some USTs, they did use petroleum
22 products as a consumer, fine. What were they told by the
23 commonwealth? One deposition, a person with knowledge, that's
24 the end of it.

25 Now PRASA. The defense noticed ten fact witnesses to

1 talk about trial sites. Oh, only three of the ten apparently
2 relate to trial sites. I see. According to plaintiffs, the
3 remaining seven are apex witnesses holding executive positions
4 and the topics in the notice are not focused on trial sites but
5 involve general information.

6 The bottom line is I would never allow seven
7 depositions of so-called apex witnesses. If three of these
8 people have information about trial sites, you can have those
9 three. Then you can pick one of the seven if you have to, to
10 say what can they say about the topics in your notice, such as
11 PRASA's knowledge and practices with respect to MTBE taste and
12 odor complaints, capital improvement, consumer confidence, all
13 the things they write about, but not seven. That's ridiculous.

14 It is frankly disturbing to listen to this
15 misbehavior. Pick one. You can have, quote, an apex witness
16 but not seven. You can have one. You can have the three who
17 know about the trial sites, you can have one who knows about
18 the policies. That is the ruling on that.

19 Now, what is this about renoticing depositions of
20 Batista and Aiala, who were both deposed in 2011? Why do they
21 have to be redeposed? There is not a lot of time here, folks?
22 Why are we redeposing?

23 MR. RICCARDULLI: We deposed the two individuals in
24 2011. You may recall this was at a time before the plaintiff
25 had collected all of their ESI productions in much of their

1 document discovery. When I went through the list this morning,
2 I think it may be about 30 productions of documents in total
3 came after these two witnesses were deposed.

4 Frankly, these two witnesses were either the director
5 or sort of subdirector or deputy director of the relevant
6 department, and their names are on many of the documents that
7 were produced subsequent to their depositions. That is why we
8 would ask them to be redeposed.

9 THE COURT: So it is to supplement, to update with
10 materials produced after the last deposition?

11 MR. RICCARDULLI: It is.

12 THE COURT: Who from the plaintiffs team can say why
13 they shouldn't have four hours each to each update it since
14 they signed a number of documents that were produced after
15 2011? Instead of fighting about it, give them half a day each
16 and be done with it.

17 MR. SHORT: Your Honor, I think we would be willing
18 to, to the extent we can locate them. They are currently
19 former employees.

20 THE COURT: Try to locate them and tell them it is a
21 half day each and get it done.

22 Now I am going to turn to the defense letter, which is
23 long and full of exhibits. I want to try to deal with some of
24 the topics.

25 The plaintiffs did send a letter on October 17th

1 identifying 34 depositions, but they also state that the
2 remaining notices remain outstanding. I can't have an open-
3 ended situation like that. Actually, I have to update that.
4 Plaintiff provided the defense with notices of 27 depositions
5 they wish to take. Well, I don't know. I don't know how the
6 27 relate to the 34. Let's go back to the first one, the
7 placeholder one.

8 On October 17th you identified 34. Do you want the
9 rest to be remain outstanding. The rest is, what, 90? I can't
10 have 90 notices hanging around as a threat or a sword over
11 people's heads. That is ridiculous. It cannot be done. I'm
12 going to strike them en masse. I want you to identify which of
13 these 121 you really need. Is that the 34? I'm asking my
14 clerk. Is that after I told you pick which of the 121 you
15 really need?

16 MS. O'REILLY: Your Honor, yes, the 34 that we
17 identified are the ones that we believe we need based on the
18 discovery that we have obtained to date. As you know,
19 defendants have indicated that some of these people are former
20 employees and may not be --

21 THE COURT: I don't know what 121 minus 34 is, but it
22 sounds like something like 90. The remaining 90 notices are
23 stricken but with this exception. On an individual basis, when
24 you complete one or more of the 34 and can make a case as to
25 why you need somebody not in the 34 by name and convince me or

1 the special master that you are right, you will be able to take
2 that person even though there is as of now no outstanding
3 notice, because I just I struck all 90. But on a case-by-case
4 need basis, if I say yes or Special Master Warner says yes, you
5 got it. But these 90 are going. That's the ruling.

6 The next topic, the list of 27 depositions. I don't
7 know what 27 that is. You are objecting to 18 of them. The
8 defendants object to 18 on the ground that defendants don't
9 control the witnesses, because they are former employees, and
10 plaintiffs haven't served timely subpoenas.

11 I saw in the response letter today that the plaintiffs
12 wrote that you took the opposite position with respect to the
13 commonwealth. They don't have to serve timely subpoenas. They
14 thought you were going to cooperate and try to find former
15 employees. Only when you have told them you have tried and
16 can't should they have to make the effort to subpoena people.

17 I overrule the defendants' objection to 18 on the
18 grounds that they are former. What I am directing the
19 defendants to do is to make an effort to find and produce them
20 and to notify the plaintiffs that on an individual basis we
21 have tried, we can't find Ms. So-and-so, you will have to
22 subpoena that person, and we will give you the last address we
23 have for that person. So there is no failure to serve timely
24 subpoenas. That is the ruling.

25 Now we go on to the individual 30(b)(6) notices. I

1 start with Chevron, I don't know why it is called Chevron
2 Estrella Puerto Rico, a notice dated September 13th.
3 Basically, Chevron Estrella Puerto Rico says it only operated
4 convenience stores and car washes, it never operated service
5 stations, it hasn't supplied gasoline with or without MTBE, and
6 the trial site in this case that is called Chevron never had a
7 Chevron Estrella convenience store. Why shouldn't this one be
8 stricken and we move on?

9 MS. O'REILLY: Your Honor, I believe Mr. Miller would
10 like to address this one.

11 THE COURT: Just Chevron Estrella, Mr. Miller, what is
12 it?

13 MR. MILLER: Your Honor, I talked to counsel for
14 Chevron and I explained it could be a single deposition of
15 Chevron Puerto Rico and Chevron Estrella simply to confirm that
16 the people who are physically at the station dealt with the
17 customers and dealt with any alarms about releases of gasoline,
18 never knew about MTBE.

19 THE COURT: No, we don't need that. Chevron Estrella
20 is a convenience store and carwash. It wasn't at the trial
21 site. We on a need to move on. I can get to Chevron Puerto
22 Rico in a minute. But Chevron Estrella doesn't need to produce
23 a special witness to say we do convenient stores and car washes
24 and we weren't on that Chevron site, we didn't have a
25 convenience store there. It is a waste of time.

1 If you want a one-paragraph declaration from Chevron
2 Estella saying what I just said, that's fine, but I don't need
3 to convene a deposition to have somebody say that in one and a
4 half minutes. I didn't even take me one half minute, but I
5 speak fast.

6 Chevron Puerto Rico. The objection is that this
7 latest notice is duplicative of a notice on September 5th, the
8 September 13th is duplicative of the September 5th one, and
9 Chevron produced a 30(b)(6) witness but plaintiffs didn't ask
10 the ten questions that were included on the notice, then they
11 want to reopen.

12 My view of that one is if plaintiff had the
13 opportunity to ask the ten questions and didn't, they probably
14 ran out of time. That doesn't give them a right to do this
15 deposition again. They are limited to written questions.

16 Plaintiffs, if you want to get those ten questions
17 answered that you could have asked then, you can take a
18 deposition on written questions. Just ask the ten questions in
19 writing and you will get a written answer. That's it.

20 Let's go on to CITGO. CITGO has three objections.
21 The first one says they didn't sell, supply, or deliver
22 gasoline to retail service stations. I don't know quite what
23 that means. It is called issue 23, and there are too many
24 issues for me to go back to the underlying documents.

25 What's that about?

1 MS. MEYER: Lisa Meyer for CITGO. First, I would like
2 to say we have not gotten a date confirmed from the plaintiffs'
3 counsel yet for the deposition and we haven't met and conferred
4 with them on these objections. We are happy to do that first.

5 THE COURT: I thought I could try to give guidance to
6 get ahead of it. If you didn't sell, supply, or deliver
7 gasoline to retail stations, what do plaintiffs want to ask you
8 about information about selling, supplying, and delivering to
9 stations, if you didn't do it? I guess the only guidance I can
10 give is when you meet and confer, if that's the fact, then
11 there shouldn't be any question about it.

12 They want to ask you about your document collection
13 efforts. I want to talk to the plaintiffs about that. My
14 instinct is no.

15 Why should you be allowed to ask CITGO about their
16 document collection efforts? What reason have they given you
17 to believe that they didn't do a proper job of collecting
18 documents?

19 MS. O'REILLY: Your Honor, we have found that a number
20 of defendants have defined the scope as only documents
21 mentioning MTBE.

22 THE COURT: Ask your adversary. Ask Ms. Meyer if she
23 did that. This is not necessary at a deposition. You people
24 are abusing the notion of depositions. I have lost patience.
25 Call Ms. Meyer up, say, Ms. Meyer, when you told your client to

1 do a search, did you limit it to only documents that had the
2 word "MTBE"? They will tell you an honest yes or no and you
3 will have your answer. No deposition, period. Forget that.

4 Let's get to the next one. This one is a repeating
5 one. I found this in a number of the 30(b)(6) notices. They
6 object to questions about corporate relationships, saying you
7 haven't pled a piercing the corporate veil allegation in the
8 third amended complaint. A number of the people made that
9 objection, so I wanted to handle that as a group. That is not
10 just CITGO. It comes up in a number of them that say why are
11 you going into corporate relationships, you haven't pled the
12 corporate veil.

13 What is this all about?

14 MR. GILMOUR: Your Honor, John Gilmour.

15 THE COURT: For the plaintiffs, right?

16 MR. GILMOUR: Yes, your Honor.

17 THE COURT: Go ahead.

18 MR. GILMOUR: If I may give you an example.

19 Relatively recently, last month, we had a deposition of Esso
20 Puerto Rico, at which we found out that there was a lot of
21 corporate interrelationships between a number of Exxon-related
22 trading companies and other Exxon entities. Part of this is to
23 determine the intercorporate relationships.

24 THE COURT: To what end, Mr. Gilmour? These are big
25 companies. They have a lot of corporations and a lot of

1 interrelationships. To what end is all this?

2 MR. GILMOUR: Your Honor, we found out that Esso
3 Puerto Rico had sold its assets in 2008, it has no remaining
4 income-producing assets, it has no remaining source of income,
5 and it has borrowed in excess of \$100 million from the parent
6 company Exxon and testified that they have no way to repay that
7 money nor any future.

8 THE COURT: What is this? Is this a judgment
9 collection action? If you win the case and someday somebody
10 finds Esso liable, you will get post-judgment discovery to
11 collect your damages. Is that what you are telling me, that
12 you are worried that you might win against a defendant who has
13 no money?

14 MR. GILMOUR: Yes, your Honor.

15 THE COURT: Great. But you worry usually about that
16 after you win. When you get a judgment, I will allow post-
17 judgment discovery so you can collect your money. There is no
18 reason to do that now. Now you are proceeding against Esso
19 Puerto Rico, if that is what it is called. If you win the case
20 someday, you win a hundred million dollars in damages, they say
21 I have no money, you get post-judgment discovery on where the
22 money went. That is the way it's done.

23 All the people who objected on that basis, fine, I
24 have sustained the objection for now. But I say very clearly
25 on this record that someday if somebody says, I have no money,

1 let's find out who has the money and how they are related and
2 whether they are responsible.

3 Now turning to Esso. The first one on Esso, issue 7,
4 says Esso has already provided codes and descriptions of each
5 gasoline product delivered to the trial sites from 1995 to
6 2008. I don't know what you are asking for in addition to what
7 Esso has already given you on issue 7.

8 MR. MILLER: I'm taking the deposition of Exxon and a
9 witness that also is testifying on behalf of Esso. I asked him
10 for the product codes. He doesn't have them.

11 THE COURT: But you do. According to this letter,
12 they have already provided you the codes and descriptions of
13 each gasoline product delivered to the trial sites for 13
14 years.

15 MR. MILLER: It says been able to confirm which
16 products contain MTBE. I have offered to work it out with
17 counsel in the form of a declaration. I don't have it.

18 THE COURT: Who wrote the letter that said that
19 plaintiffs have already provided codes and description of each
20 gasoline product delivered to the trial sites? Who wrote that?

21 MR. RICCARDULLI: I wrote the letter.

22 THE COURT: Fine. Do those codes and descriptions
23 describe which ones contain MTBE?

24 MR. RICCARDULLI: I don't believe they describe which
25 products contain MTBE.

1 THE COURT: That is kind of critical, don't you think,
2 Mr. Riccardulli? Why don't you amend that. Mr. Miller said he
3 would take it as a declaration. Get somebody to provide a
4 declaration that includes codes and descriptions regarding
5 whether or not the product contained MTBE from 1995 to 2008 and
6 you will be done with that issue. That's it.

7 MR. RICCARDULLI: Your Honor, if we have the
8 information, we will give it to them.

9 THE COURT: You had better find the information.
10 Surely if you found codes and descriptions, you know whether it
11 contained MTBE or not.

12 MR. RICCARDULLI: Your Honor, just for the record, the
13 code refers to conventional gasoline or unleaded gasoline. My
14 understanding is it doesn't necessarily indicate whether or not
15 a particular batch of gasoline contained MTBE code. If it
16 contains the information, we will give it to them if we haven't
17 already.

18 THE COURT: Do it and do it fast. The discovery
19 deadline is coming up, and then we have to turn to experts and
20 then trial if we can't settle it.

21 Issues 20 and 21, this is redundant because Esso
22 already provided a list of locations. They had negotiated
23 search terms and provided search results. So I'm not sure what
24 issues 20 and 21 are, but Esso is saying they have already
25 given you this information.

1 Who from the plaintiffs' side wants to be heard? No,
2 I guess would be defense. I'm confused now. Why isn't this
3 sufficient? Right, do I want to speak to plaintiffs. It says
4 they have already done this. Why aren't plaintiffs satisfied
5 with what they have already gotten?

6 MR. MILLER: I believe that the notice that is
7 referred to here is the one I'm trying to depose a witness on
8 now.

9 THE COURT: I'm talking about issues 20 and 21, that's
10 all I know them by, where they say they have already given you
11 custodians, locations, search terms, and search results. What
12 more are you trying to find out?

13 MR. MILLER: The notice isn't about ESI. Those two
14 issues may encompass ESI, but that is not the purpose of those
15 issues.

16 THE COURT: What are issues 20 and 21.

17 MR. MILLER: We are trying to get the documents that
18 we need concerning the gasoline supplies.

19 THE COURT: I don't know enough about issues 20 and 21
20 to figure out what to do here. The way I had it summarized, it
21 had only to do with USI search terms and search results. If
22 you are saying there are documents beyond electronic, there are
23 old paper documents that you haven't gotten that identify
24 product information that you need, I can only you have to meet
25 on confer.

1 22 to 25 we have already talked about. This is
2 supposedly again this corporate veil issue. I just discussed
3 that.

4 Finally, for the first time, but it comes up again,
5 Esso objects to issue 26 because it says you are seeking
6 authentication of all documents produced by Esso. That does
7 seem a little ridiculous. What do you mean by that? What are
8 you trying to find out? Is this Mr. Miller again?

9 MR. MILLER: Yes, your Honor.

10 THE COURT: What do you want them to do to
11 authenticate every document they ever produced? What do you
12 want them to say?

13 MR. MILLER: I would like them to do a declaration on
14 their letterhead that their Bates number are authentic or give
15 me a basis. These are the documents that fit specific
16 categories of the 30(b)(6) notice that are highly relevant.

17 THE COURT: Basically, you don't want to have an
18 authentication issue at trial. You want them to essentially
19 concede that anything they produced to you is authentic and
20 they are not going to object on the basis of authenticity if
21 you use it at trial or motion, is that it?

22 MR. MILLER: Yes.

23 THE COURT: Good idea. I'm with you on that.
24 Somebody from Esso, who wants to speak, should give some kind
25 of a declaration saying if we produced it from our files, we

1 are going to say it's authentic and we are not going to contest
2 authenticity at trial or on motion.

3 MR. RICCARDULLI: Your Honor, I guess the issue is if
4 they are talking about specific documents. But we may have
5 produced documents that we didn't create that were in our
6 files. That is the problem with authenticating stuff. We are
7 certainly willing to say we produced it, but we can't
8 necessarily authenticate everything we produced in the
9 litigation.

10 THE COURT: I don't know about that. What you are
11 really saying is we are not planning to object to authenticity.
12 If you produced, I make this up, 10,000 documents let's say
13 from Esso, you can't put the plaintiffs through the trouble of
14 having to go around trying to authenticate all 10,000 when
15 essentially you are saying that anything that originated with
16 us we agree is authentic; anything in our files that came from
17 somebody else, we are not going to contest authenticity if it
18 came on somebody else's letterhead. If we have a stray piece
19 of paper with handwritten notes, that is a different issue.

20 You need to reach an accommodation, an accord, both
21 sides, on authenticity.

22 MR. RICCARDULLI: I agree, your Honor. This came up
23 in the City of New York case. What the parties did was annex
24 an exhibit list, and then the parties sat down and figured out
25 if there were problems. I might suggest this be put off until

1 we are closer to trial and understand who is left.

2 THE COURT: Right. But I don't think it should be a
3 deposition issue. It shouldn't waste time or people power.
4 You should get it done by declaration and you should do
5 probably what I just said. You should say right now that for
6 anything originating in the company we are never going to
7 contest authenticity, for anything found in our files that was
8 on a letterhead of another company we are not going to contest
9 authenticity, we reserve the right to contest authenticity on a
10 document-by-document basis if it doesn't fall into either of
11 those two categories.

12 Wouldn't that be really easy? The answer is yes.

13 Plaintiffs. The same objection comes up with Exxon,
14 at least two of them, for piercing the corporate veil thing,
15 the authentication thing, so we can zip right through that.

16 I am turning to Exxon now, the October 15 30(b)(6)
17 notice. The issues 26 and 27, this is the one about discovery.
18 Apparently Exxon is saying that the plaintiffs are getting into
19 again how they produced their documents. Why do we need any
20 more on that?

21 MS. O'REILLY: We did originally confer with
22 defendants to resolve this without the need for a deposition
23 and we are continuing to do so. We are not insisting on
24 depositions on these topics at this time.

25 THE COURT: That is helpful to know, because I don't

1 think you should take a deposition on this unless you can
2 convince me of why that is necessary. So the answer is right
3 now the objection is sustained.

4 Exxon says it did not supply, deliver, sell, or market
5 gasoline to or within Puerto Rico, nor did it have any business
6 relationship with any service stations, terminals, plants, or
7 facilities in Puerto Rico. They object to a number of these
8 categories 1 through 6, 14, 17 through 18, 20, and 23 on that
9 basis. If that is so, you shouldn't be wasting time doing it.

10 MR. MILLER: Your Honor, today in a deposition I
11 established that shipments from ExxonMobil USA refineries went
12 straight to Puerto Rico and had MTBE in them. Those statements
13 are not borne out by the witnesses or the documents.

14 THE COURT: Why did you write, Mr. Riccardulli, that
15 ExxonMobil did not supply, deliver, sell, or market gasoline to
16 or within Puerto Rico when the witness deposed today said that
17 they did in fact?

18 MR. RICCARDULLI: Your Honor, I was not involved in
19 the deposition today, so I'm not sure what Mr. Miller is
20 referring to.

21 THE COURT: All I can say is if it turns out that
22 Exxon did supply, deliver, sell, or market, then it is
23 relevant. If they did not do any of those and it is provable,
24 then it is not relevant. I'm not sure that is very helpful
25 guidance, but it is the best I can do.

1 I want to go on to Hess. Hess raised the issue that
2 some of plaintiffs' requests are not limited to Puerto Rico at
3 all, they are going outside of Puerto Rico. I don't know what
4 St. Croix has to do with it, but my notes say because
5 plaintiffs' requests are not limited to Puerto Rico or St.
6 Croix. Why are plaintiffs going beyond Puerto Rico?

7 MR. SHORT: A number of defendants in this current
8 litigation were located in the United States but supplied to
9 Puerto Rico. Those are the particular parties we are looking
10 for information about.

11 THE COURT: You are not looking for any supplies other
12 than to Puerto Rico?

13 MR. SHORT: Any supplies that we do not have a link to
14 Puerto Rico, correct.

15 MR. MILLER: The refinery we are talking about is in
16 St. Croix. It is not a Hess refinery. It was Hovensa and
17 Hovic, just so we are clear. In St. Croix this was a refinery
18 operated by Hovic and Hovensa. Hess may be an investor in
19 that, but it is a separate corporation and it is not a party to
20 this lawsuit. That is why the word "St. Croix" appeared, your
21 Honor.

22 THE COURT: The real point is that the plaintiffs
23 agree they are not seeking information outside a product that
24 went to Puerto Rico but they are allowed to find out where the
25 product originated that went to Puerto Rico. I agree.

1 MR. LIEFER: We agree.

2 THE COURT: They are allowed to seek testimony of Hess
3 if it has information about Hovic and Hovensa's decision to use
4 MTBE. Even if you say you are not a party, if there is
5 information from a nonparty that is relevant to a case,
6 generally a nonparty has to give the information. Mr. Liefer,
7 I don't see the objection. If you have information, then you
8 have to give it.

9 MR. LIEFER: The designated issue says division of
10 Hovic and Hovensa, and then its lists --

11 THE COURT: That is correct. If you have information
12 relating to that, give it. If you don't, say we have no such
13 information. If you have it, all right.

14 Now I get to Hovic & Hovensa?

15 MR. LIEFER: I'm not sure these are even relevant now.

16 THE COURT: Let's go to Lyondell.

17 MR. LIEFER: I don't want to not give the plaintiffs
18 an opportunity to speak. We pointed out in our letter that
19 these are not the deposition notices that they indicated as
20 ones they want to pursue at the moment. That is why I was
21 suggesting that perhaps this is not relevant.

22 MR. MILLER: The notice to Hovic and Hovensa predated
23 last Friday. My understanding is this hearing was about the
24 notices served at that time.

25 THE COURT: I'm over an hour now. I've got to go.

1 All I can do is finish giving very rough guidance. I am up to
2 Lyondell and I want to do it. It says you are demanding
3 information on sales of neat MTBE to two refineries outside of
4 Puerto Rico. You have already said we are sticking to only
5 within Puerto Rico. If refineries outside of Puerto Rico sent
6 product to Puerto Rico, then it is relevant. But if plaintiffs
7 want information on sales to somewhere else, not relevant.

8 MR. SHORT: We agree, your Honor. We are only asking
9 the seller for refineries who deliver to Puerto Rico.

10 MR. MOLLER: Jeff Moller for Lyondell. The deposition
11 notice lists a long list of companies to whom Lyondell may have
12 sold anywhere in the United States. He hasn't yesterday
13 provided us with evidence that there was in fact batches of
14 gasoline that went from a particular refinery to Puerto Rico.
15 If he produces information that yes, batches of gasoline went
16 from Phillips in Bartlesville, Oklahoma --

17 THE COURT: I'm sorry, I don't agree with you. I
18 don't think there is a burden shift here. He is allowed to
19 determine what refineries shipped into Puerto Rico. You are
20 more in control of that information than he is. He has no
21 burden to prove it to you first. He is allowed to say provide
22 information from any refinery that shipped into Puerto Rico,
23 and you do the work. It is your documents, it is your records,
24 it is your company.

25 MR. MOLLER: Your Honor, I'm sorry to interrupt.

1 Lyondell is an MTBE manufacturer. We don't know who ships
2 gasoline from our customers' refineries in Marcus Hook or
3 Louisiana or Texas to Puerto Rico. They purchased MTBE from
4 us. Yes, we had some customers who listed their locations as
5 being in Puerto Rico, Phillips or Caribbean Gulf, and so forth.
6 But we have no idea, until Mr. Miller demonstrates the
7 relevance of which of our customers sold gasoline containing
8 MTBE to Puerto Rico when.

9 For us to give him huge amounts of sales documents,
10 not merely summaries or a declaration -- he has refused a
11 declaration -- huge amounts of sales documents to Marcus Hook,
12 to Phillips anywhere in the country, the trader, all these
13 entities without us understanding what years are relevant for
14 Puerto Rican sales from those entities and how much is
15 relevant, this is an unnecessary fishing expedition.

16 THE COURT: I got your point. When are we
17 reconvening? I am off this phone. I have to stop right now on
18 a dime. When do you want to finish this discussion? I have
19 five or six more pages to go, and I'm out of time, period. Do
20 you want to talk about this tomorrow?

21 MR. RICCARDULLI: Yes, your Honor, tomorrow works for
22 defendants.

23 THE COURT: 11:30. No, I can do better than that.
24 2:30 tomorrow. I'll run through the rest of it. Bye-bye.

25 (Adjourned to 2:30 p.m., October 23, 2013)